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April 10, 2009

By Hand Delivery

The Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, S.W
Washington, D.C. 20423-0001

Re: STB Finance Docket No. 35219;
Comments of CF Industries, Inc.

Dear Secretary Quinlan:

Enclosed for filing in the above referenced matter are an original and 10 copies of the Comments of CF Industries, Inc to Union Pacific Railroad Company – Petition for Declaratory Order

An additional three copies of this submission are enclosed herewith Please date-stamp these additional copies and return them to our messenger

Should you have any questions concerning this matter, please do not hesitate to contact the undersigned.

Sincerely,

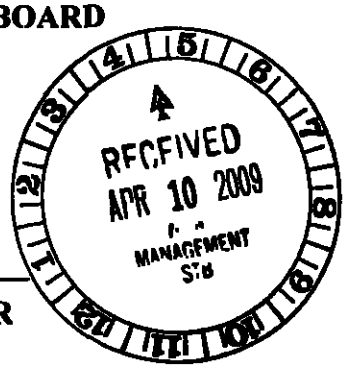
P.E. Groomes

Patrick E. Groomes

Counsel for **CF Industries, Inc.**

Enclosures

BEFORE THE SURFACE TRANSPORTATION BOARD



STB Finance Docket No. 35219

UNION PACIFIC RAILROAD COMPANY — PETITION FOR DECLARATORY ORDER

Comments of

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April 10, 2009

COMMENTS OF CF INDUSTRIES, INC. TO UNION PACIFIC RAILROAD COMPANY — PETITION FOR DECLARATORY ORDER

In its February 18, 2009 Petition for Declaratory Order (the "Petition"), the Union Pacific Railroad Company ("UP") requested that the Surface Transportation Board (the "Board") "issue an order clarifying the extent of the common carrier obligation" when a common carrier determines certain circumstances exist. Although UP requests clarification of the common carrier obligation generally, the facts asserted by UP relate solely to UP's refusal to provide rates to a specific shipper for specified movements of chlorine. Notwithstanding any perceived ambiguity by UP, ***no controversy*** or ***uncertainty*** exists with regard to UP's ***statutory obligation*** to provide rates for the requested movements. There is, accordingly, no basis for the Board to grant UP the requested declaratory relief. Moreover, even if the Board were to consider granting some other form of relief *sua sponte*, there is no basis in the record of this proceeding for it to relieve UP and other common carriers of any common carrier obligation, including the obligation to provide rates upon request:

- Any deviation by the Board from its rules under 49 C.F.R. Part 1300 other than by notice and comment rulemaking is impermissible.
- UP's request is merely a re-packaging of the railroads' improper attempt to be relieved of their obligation to transport toxic inhalation hazard ("TIH") materials, which is at issue in another proceeding currently pending before the Board;
- To the extent UP's requested relief is based on the need for safe and secure transportation of chlorine or other TIH materials, those considerations are subject to regulation by other agencies and the Board has no authority to grant such relief.

- To the extent UP's requested relief is based on economic issues associated with UP's transportation of chlorine or other TIH materials, the statutory mechanism for granting such relief is an exemption pursuant to 49 U.S.C. § 10502, which UP has not requested; and
- Even if UP's request for relief could be construed as a request for an exemption, UP has failed to provide sufficient information for the Board to make the required statutory findings.

UP has failed to state any basis on which the Board may relieve UP or any other common carrier of any common carrier obligation, whether to provide rates upon request or otherwise. The Board should not allow UP to circumvent the existing regulatory structure applicable to transportation safety and security, nor should it reach out to decide matters that are within the regulatory purview of other federal agencies. The Board should therefore deny UP's petition for declaratory relief.

I. Interest in Proceeding

UP petitioned the Board to "clarify" a common carrier's obligation in light of UP's recent refusal to provide common carriage rates for certain movements of chlorine, a TIH material.[1] CF Industries is one of North America's largest manufacturers and distributors of nitrogen and phosphate fertilizer products, including anhydrous ammonia (also a TIH material). Like other TIH manufacturers, CF is dependent on rail carriers for the transportation of many of its products. Although the facts set forth in UP's Petition may be limited to a specific shipper for defined chlorine movements, its requested relief extends to the transportation of other TIH materials generally and beyond. Furthermore, UP has requested that the Board grant relief not

[1] Petition at pp 1-2

just to UP, but to all common carriers. Thus, CF Industries has a strong interest in the outcome of this proceeding.

II. Nature of UP's Request

US Magnesium LLC ("USM") requested that UP provide rates for several movements of chlorine. UP "declined" to do so and then sought the Board's "views on [its] decision."[2] UP requests that the Board, by declaratory order, "clarify" a *common carrier's* obligation — not UP's — where the requested transportation: (i) has not been used recently, (ii) would displace much closer sourcing options; and (iii) would increase safety and security risks to employees and the public (the "Proposed Exemption Criteria").[3] While UP does not explicitly state that the clarification it seeks is to be relieved of the obligations imposed on it by the ICC Termination Act of 1995 (the "ICCTA")[4] and the Board's rules thereunder, no other conclusion can be reached.

In addition, "[b]ecause an order requiring UP to publish rates for such movements appears to conflict with [Transportation Security Administration (the "TSA")] and [Federal Railroad Administration (the "FRA")] policies, UP urges the Board to consult with those agencies before ruling on this petition."[5] But no order from the Board is necessary to obligate UP to provide the requested rates. It is thus unclear what conflicts UP believes may exist.

In order to evaluate UP's request, the Board must disaggregate this request into its constituent parts – the facts asserted by UP, the relief sought by UP, and the basis for the requested relief. Although there is some dispute regarding assertions made by UP in its Petition, there does not appear to be any dispute that USM requested rates for specified chlorine

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[2] *Id* at p 2

[3] *Id* at p 4

[4] P L No 104-88, 109 Stat 803 (1995) (codified in scattered sections of 49 U S C.).

[5] Petition at p 4

movements and UP refused to provide the requested rates.[6] Nonetheless, UP's requested clarification is not limited to the proposed USM movements, a specific common carrier, a specific common carrier obligation, or a specific commodity. Thus, there is a gap between the (i) specific, narrow, retrospective issue of UP's refusal to provide USM rates upon request for specified movements, and (ii) the non-specific, broad, prospective relief requested by UP for clarification of the common carrier obligation whenever a common carrier may determine that the Proposed Exemption Criteria are met. The very nature of UP's requested relief makes the facts surrounding its refusal to provide USM the requested rates, for the most part, irrelevant and the Board should not waste its resources delving any deeper into them.[7]

III. UP's Request Is Deficient

UP fails to state a basis on which the Board may grant relief. UP fails to provide any explanation how its Proposed Exemption Criteria give rise to the slightest degree of ambiguity with regard to any common carrier obligation, including the obligation to provide rates upon request. Perhaps this is because no such ambiguity exists To the extent UP's request for relief rests on issues of safety and security, UP's Petition is a collateral attack on the actions of those agencies with delegated authority to address those matters. The Board must defer to those agencies.

To the extent UP's request for relief rests on economic justifications (and it is not clear that it does), there is an exclusive statutory mechanism in place for evaluating a common carrier's request for relief from the ICCTA. That mechanism is an exemption, not a request for declaratory relief. UP's Petition fails to make any showing that the Proposed Exemption Criteria

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[6] *Id* at p 2

[7] *See, e g , Arizona Elec Power Coop v Burlington N. and Santa Fe Ry Co* , STB No 42058, 2001 WL 489999, at *1 (STB, May 8, 2001) ("*AEPCO*") (noting that certain facts asserted in the case were irrelevant because "railroads have a general duty under 49 U.S.C 11101(b) to establish common carrier rates upon request ")

meet the necessary conditions for an exemption and, indeed, it cannot make such a showing. Exemptions have a limited purpose, which cannot be satisfied under any of the circumstances identified by UP.

A No Controversy or Uncertainty Exists

As noted above, the only common carrier obligation specifically raised in UP's Petition is the obligation to provide rates upon request. This obligation is in no need of clarification. The ICCTA requires that "[a] rail carrier ***shall . . . provide*** to any person, on request, the carrier's rates and others service terms."[8] The language of 49 U.S.C. §11101(b) is neither discretionary nor conditional. Nor is it ambiguous.[9] Furthermore, the Board's rules incorporating a common carrier's obligation to provide rates upon request provide only two exceptions to that obligation – (i) when the transportation or service is provided pursuant to a contract entered into under 49 U.S.C. § 10709, and (ii) when the transportation or service has been exempted pursuant to 49 U.S.C. § 10502.[10] These exceptions mirror those set forth in the ICCTA. UP's mere statement that the common carrier obligation is in need of clarification does not create the controversy or uncertainty subject to the declaratory relief UP seeks. The ICCTA, the Board's rules, and the Board's decisions are clear and unambiguous on this matter. Absent the exceptions noted above, a common carrier ***must*** provide rates upon request.[11] Although the Board enjoys discretionary

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[8] 49 U S C § 11101(b) (1996) (emphasis added)

[9] *See Chevron, U S A , Inc v Natural Res Def Council, Inc , et al*, 467 U S 837, 842-43, *reh'g denied*, 468 U S 1227 (1984) ("First, always, is the question whether Congress has directly spoken to the precise question at issue If the intent of Congress is clear, that is the end of the matter, for the court, *as well as the agency*, must give effect to the unambiguously expressed intent of Congress." (emphasis added))

[10] 49 C F R § 1300 1 (2008) *See also Disclosure, Publication, and Notice of Change of Rates and Other Service Terms for Rail Common Carriage*, 61 Fed Reg 35,139 (July 5, 1996) (codified as 49 C.F.R. Part 1300).

[11] *Pejepscot Indus Park, Inc , d/b/a Grimmel Indus – Petition for Declaratory Order*, STB No 33999, 2003 WL 21108198, at *7 (STB, May 9, 2003), *reconsideration granted in part*, 2003 WL 22521399 (STB, Nov. 5, 2003) ("*Pejepscot*"), *AEPCO*, 2001 WL 489999 at *2 ("railroads have a general duty under 49 U S C 11101(b) to establish common carrier rates upon request"), *Western Res , Inc v Atchison, Topeka and Santa Fe Ry Co* , STB No. 41604, 1996 WL 257677, at *4-5 (STB, May 7, 1996) (a railroad's common carrier obligation requires it to comply with any reasonable request for service as well as shipper requests for rates)

authority to issue a declaratory order where necessary to terminate a controversy or remove an uncertainty,[12] there is no controversy to be terminated and no uncertainty to be removed in this proceeding Declaratory relief is therefore unavailable under 5 U.S.C. § 554(e) Moreover, notwithstanding UP's allusions to the contrary in its Petition, UP's obligation to provide the requested rates is not contingent on the Board issuing an order requiring UP to do so.[13]

B. The Relief Requested by UP Constitutes Rulemaking

UP has requested that the Board "clarify" a common carrier's obligations *prospectively*. relieving it and other railroads of the *obligation* to provide rates, and eliminating a shipper's corresponding *right* to such rates, when a common carrier determines the Proposed Exemption Criteria are met. What UP has requested is the Board's "statement of *general or particular applicability* and *future effect* designed to implement, interpret, or prescribe" the common carrier obligation to provide rates upon request.[14] It has requested, by definition, a rule carrying the force of law.[15] Characterizing the Board's decision as a clarification would have no effect on the fact it would be a rule An "agency's characterization of its own action is not controlling if it self-servingly disclaims any intention to create a rule with the 'force of law,' but the record indicates otherwise."[16] As the D.C. Circuit has repeatedly held, even if an agency claims that it is providing only interpretive guidance, an agency statement becomes a binding rule if it reflects

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[12] 5 U S C § 554(e) (1978).

[13] 49 U.S.C § 11101(b) (1996).

[14] 5 U S C § 551(4) (1994) (emphasis added).

[15] *Id*; *see also National Ass'n of Home Builders v U S Army Corps of Eng'rs*, 417 F 3d 1272, 1285 (D C Cir 2005), *appeal dismissed as moot*, 264 Fed Appx 10 (2008) ("Legislative rules are those that grant rights, impose obligations, or produce other significant effects on private interests " (*quoting Batterton v Marshall*, 648 F 2d 694, 701-02 (D C Cir 1980))).

[16] *CropLife Am v E P.A* , 329 F 3d 876, 883 (D C Cir 2003).

the agency's settled position on an issue, which the agency intends to follow and will insist be complied with [17]

The Board cannot create a rule by adjudication and cannot utilize rulemaking to settle any perceived controversy between UP and USM.[18] The Board may not grant the general, prospective relief UP has requested by declaratory order because its authority under Section 554(c) is limited solely to adjudicatory proceedings.[19]

As noted above, the Board's rules incorporate the ICCTA's requirement that a common carrier provide rates upon request.[20] Part 1300 contains only two exceptions – transportation or services subject to a private contract and transportation or services that are the subject of an exemption.[21] Neither of these exceptions adhere to the facts asserted by UP in its Petition. Granting the relief requested by UP would be a deviation from 49 C F R. § 1300.1 and would constitute an amendment or revocation of an existing rule, which the Board may accomplish only by engaging in a formal rulemaking.[22] The Board accomplishing such a result by any other means would "render the requirements of [5 U.S.C.] § 553 basically superfluous in legislative

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[17] *See Appalachian Power Co. v. E P A.*, 208 F 3d 1015, 1020-23 (D C Cir 2000), *General Elec Co v Envtl Protection Agency.*, 290 F 3d 377, 385 (D.C. Cir. 2002) (agency guidance documents that have the force of law in practice are legislative rules subject to judicial review)

[18] *See Clark-Cowlitz Joint Operating Agency v F E R C*, 826 F 2d 1074, 1082 (D.C. Cir 1987), *cert denied*, 485 U S 913 (1988) ("[The] Administrative Procedure Act generally contemplates that when an agency proceeds by adjudication, it will apply its ruling to the case at hand; when, on the other hand, it employs rulemaking procedures, its orders ordinarily are to have only prospective effect"), *see also Georgetown Univ Hosp v Bowen*, 821 F 2d 750, 757 (D C. Cir. 1987), *aff'd*, 488 U S 204 (1988) (finding a retroactive rule impermissible).

[19] *See Hercules, Inc v E P A*, 598 F 2d 91, 117 (D.C Cir 1978) ("It is well settled that [S]ection 554 applies only in cases of adjudication, and not to rulemaking proceedings")

[20] 49 C F R. Part 1300 (2008)

[21] *See* 49 C F R. § 1300.1 (2008)

[22] *National Family Planning & Reprod Health Ass'n, Inc v Sullivan*, 979 F 2d 227, 231 (D C Cir 1992) ("*National Family Planning*") (When an agency has promulgated a rule, whose meaning the agency "announces as clear and definitive to the public . . it may not subsequently repudiate that announced meaning and substitute for it a totally different meaning without proceeding through the notice and comment rulemaking normally required for amendments of a rule.")

rulemaking by permitting [it] to alter [its] requirements for affected public members at will through the ingenious device of 'reinterpreting' [its] own rule "[23]

Of course, even if the Board were to engage in such a formal rulemaking process, it should be mindful that a rule that "runs contrary to the plain meaning of the statute must be reversed."[24] The exceptions set forth in 49 C.F.R. § 1300.1 are those set forth in the ICCTA The relief sought by UP is not permitted by the ICCTA and, as such, could not be adopted by the Board even through formal rulemaking.

C. UP's Request Concerns Issues Already Before the Board

In reviewing UP's request in this proceeding, the Board should fully consider the matters before it in Ex Parte 677 (Sub. No. 1)[25] Comments by the railroads regarding the common carrier obligation to transport TIH materials upon reasonable request are irrelevant to this proceeding.[26] That is the very issue before the Board in the Common Carrier Proceeding. The Board should not permit the railroads to have a second bite at the apple by raising issues in this proceeding that were, or should have been, raised in the Common Carrier Proceeding The basis of UP's Petition is its refusal to provide rates upon request and that is the issue on which the Board should focus.

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[23] *Id* at 231-232.

[24] *Fertilizer Inst v US E.P A*, 935 F 2d 1303, 1309 (D.C. Cir 1991). *See also National Family Planning*, 979 F 2d at 230-31 ("An agency, in light of changing circumstances, is free to alter the interpretative and policy views reflected in regulations construing an underlying statute, so long as any changed construction of the statute is consistent with express congressional intent or embodies a 'permissible' reading of the statute, and is otherwise reasonable " (citations omitted))

[25] *Common Carrier Obligation of Railroads – Transportation of Hazardous Materials*, STB Ex Parte No 677 (Sub No 1) (the "Common Carrier Proceeding")

[26] *See, e g*, Comments of the Association of American Railroads, STB Finance Docket No 35219 (Apr 9, 2009), Comments of CSX Transportation, Inc., STB Finance Docket No 35219 (Apr 9, 2009)

In the Common Carrier Proceeding, the railroads (including UP) stated that they did not seek to avoid their common carrier obligation to transport TIH materials [27] Contrast that position with UP's position in this proceeding. UP is seeking relief from its obligation to provide rates, which is a trap door for eliminating the common carrier obligation to transport TIH materials upon reasonable request [28] If the railroads' obligation to provide rates and terms upon request were to be modified or eliminated, the only way for a shipper to obtain such rates and terms would be through negotiating a contract for carriage pursuant to 49 U.S.C § 10709. This would allow the railroads to extract non-market rates and terms of service from shippers or to refuse to provide service altogether. This would be precisely the type of abusive practice the Board is charged with preventing

D. The Board Does Not Have Jurisdiction Over TIH Safety or Security

UP attempts to paint over the statutory requirements of the ICCTA and the Board's rules with injections of emotion and hysteria where law and fact are not on its side. UP asserts that public safety is at the heart of its request. If that were true, UP would not have sought relief before the Board, but before the agencies with statutory authority to address UP's concerns.

Congress vested the Secretary of Transportation with the authority to "prescribe regulations and issue orders for every area of railroad safety,"[29] and the Secretary in turn delegated authority over railroad safety and hazardous materials transportation to the FRA and the Pipeline and Hazardous Materials Safety Administration (the "PHMSA") – not to the

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[27] *See, e g*, Written Testimony of Diane K Duren, UP's Vice President and General Manager – Chemicals, STB Ex Parte 677 (Sub No 1), at p 24 (July 10, 2008) ("[UP] is not asking to be relieved of its common carrier obligation to transport TIH "), Written Testimony of the Association of American Railroads, STB Ex Parte 677 (Sub. No 1), at p 31 (July 10, 2008) ("The [Association of American Railroads], at this time, does not seek for the railroads to be relieved of their common carrier obligation to transport TIH materials ").

[28] *Pejepscot*, 2003 WL 21108198 at *4, 6 ("It is axiomatic that a rail carrier may not indirectly avoid its common carrier obligation to provide service by evading its obligation to establish rates upon request This failure to provide a responsive rate quote, pursuant to which service could be provided, leads to the conclusion that there has been a violation of [the railroad's] common carrier obligation to do so.").

[29] 49 U S C § 20103(a) (2008).

Board.[30] Acting pursuant to authority delegated under the federal railroad safety laws, 49 U S.C. § 20101, the FRA has promulgated and enforced a comprehensive regulatory program over all areas of railroad transportation safety.[31] Acting pursuant to authority delegated under the federal hazardous material transportation law, 49 U.S C. § 5101, *et seq.*, the PHMSA has "prescribe[d] regulations for the safe transportation of hazardous materials in intrastate, interstate, and foreign commerce." Similarly, the TSA is vested with jurisdiction over railroad security matters.[32] The TSA has promulgated regulations and worked with DOT to evaluate security risks and establish recommendations and programs to address those risks.[33] In contrast, the Board has been delegated no authority to regulate either railroad transportation safety or security generally or the transportation of hazardous materials specifically, as recent court decisions have unequivocally confirmed.[34] If the Board were to accept UP's invitation to use its economic oversight to restrict or discourage transportation of hazardous materials for safety or security reasons, those policies — no matter how well intended — would inevitably conflict with the FRA's, PHMSA's, and TSA's responsibility to strike a delicate balance between the safe and

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[30] *See* 49 U S.C §§ 103 & 108 (2008 & 2004); *see also* 49 C F R §§ 1 49, 1 53(b) (2008) With respect to the safety issues UP raises, the Petition presents issues similar to those being considered in the Common Carrier Proceeding As the Department of Transportation ("DOT") noted on the first page of its July 22, 2008 testimony in that proceeding, the FRA, working with the PHMSA, is "the agency charged by Congress with oversight of rail safety matters " CF Industries expects the DOT to make a filing taking a similar position in this case

[31] *See* 49 C F R Parts 200-244 (2008)

[32] *See* 49 U S C § 114 (2007) (as amended)

[33] *See, e g , Recommended Security Action Items for Rail Transportation of Toxic Inhalation Hazard Materials*, Supplement No 1 (issued Nov. 21, 2006) and Supplement No. 2 (issued Feb 12, 2007), which are intended to provide guidance to railroads in based on DOT and TSA risk assessments and security reviews (available at http //www.tsa gov/what_we_do/layers/trip/freight_rail_security shtm) *See also* 49 C F R § § 172.704 and 172 800-804 (2008), requiring railroads and other person transporting hazardous materials to train appropriate employees in security measures and develop and adhere to a security plan

[34] *Boston and Maine Corp v Surface Transp Bd*, 364 F 3d 318, 321 (D C Cir 2004) ("primary jurisdiction over railroad safety belongs to the FRA, not the S T B "), *Tyrrell v Norfolk S Ry Co*, 248 F 3d 517, 523 (6th Cir 2001) (there is "no evidence that Congress intended for the S T B to supplant the FRA's authority over rail safety")

economical transportation of hazardous materials and whatever limitations on such transportation are absolutely and unavoidably necessary.[35]

Consistent with the Secretaries' delegations of authority, the FRA and PHMSA, together with the TSA, are the appropriate agencies to review UP's safety and security concerns.[36] They have, in fact, recently conducted extensive proceedings addressing various aspects of the transportation of TIH materials, including routing.[37] UP had, and continues to have, the right to raise its safety and security concerns with these agencies. The Board should not permit UP to collaterally attack decisions or circumvent the authority of these agencies. The Board therefore should defer to these agencies with respect to safety and security issues raised by UP

E There Is No Basis for Exemption from the ICCTA

To the extent UP believes that the issues it has raised concern matters other than the safe and secure transportation of TIH materials, such issues would have to fall within the Board's economic regulatory authority in order for the Board to be able to act upon UP's request. Given the paucity of facts and law in UP's Petition, it is not clear that UP's concerns are economic in nature. However, even if they are, there is no basis in law for the Board to grant UP or any other common carrier relief from the obligation to provide rates upon request.

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[35] *See generally Rodriguez v United States*, 480 U S 522, 526 (1987) ("[d]eciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice — and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law")

[36] *Hazardous Materials Enhancing Rail Transp Safety and Sec for Hazardous Materials Shipments*, Notice of Proposed Rulemaking, 73 Fed. Reg 17,818-01, 17,820 (Apr 1, 2008) ("[i]mproving the safety and security of hazardous materials transportation via railroad tank car is an on-going process").

[37] *Hazardous Materials Improving the Safety of Railroad Tank Car Transportation of Hazardous Materials*, 74 Fed. Reg 1770-01 (Jan 13, 2009) (to be codified in 49 CFR Parts 171-174, and 179) (final rule prescribing enhanced safety measures, including railroad tank car design specifications, for tank cars transporting TIH materials), *Hazardous Materials Enhancing Rail Transportation Safety and Security for Hazardous Materials Shipments*, 73 Fed Reg 72,182-01 (Nov 26, 2008) (codified in 49 CFR Parts 172 and 174) (final rule concerning data compilation regarding transportation of hazardous materials); *Railroad Safety Enforcement Procedures, Enforcement, Appeal, and Hearing Procedures for Rail Routing Decisions*, 73 Fed Reg 72,194 (Nov. 26, 2008) (to be codified in 49 C F R. Part 209), *clarified by*, 74 Fed. Reg 6995-01 (Feb 12, 2009) (final rule establishing procedures to enable rail carriers to challenge routing decisions made by FRA)

Pursuant to 49 U.S.C. § 10502, the Board has authority to exempt a person, class of persons, transportation, or service from provisions of the ICCTA under specified circumstances. The Board must issue an exemption from regulation if and ***only*** if (i) the application of a regulation is not necessary to carry out national rail transportation policy, ***and*** (ii) either the transaction or service is of limited scope, or the application of a regulation is not needed to protect shippers from the abuse of market power.[38] ***In the absence of such findings by the Board, the Board has no exemption authority.***[39]

UP's Petition lacks any evidence that the Board would need to make the requisite findings under 49 U.S.C. § 10502(a). Rather, UP simply requests that the Board "clarify" a common carrier's obligation when the Proposed Exemption Criteria purportedly are met. Such broad generalizations are insufficient to be a reasoned basis for decision. Furthermore, UP has not submitted any of the materials required by 49 C F R § 1121.3.[40] Thus, UP's Petition is deficient to the extent it could be construed as a request for an exemption from the ICCTA.

Even if UP had supported its broad generalizations and if such generalizations were found to be true, an exemption would not be appropriate in this case. An exemption is intended to encourage competition by eliminating unnecessary railroad regulation.[41] It does not make lawful any "competitive practice that is unfair, destructive, predatory, or otherwise undermines competition."[42] Nor does it diminish the Board's role in protecting shippers and the public from

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[38] 49 U S C. § 10502(a) (1995).

[39] *Coal Exp Ass'n of U S., Inc v U S.*, 745 F 2d 76, 82 (D C Cir 1984), *cert denied*, 471 U S 1072 (1985) ("*Coal Exp*")

[40] The Board's regulations set forth its procedures for a request for exemption, including the contents of an exemption filing. *See* 49 C.F R Part 1121 (2008)

[41] *Coal Exp*., 745 F 2d at 82 (*citing American Trucking Ass'ns, Inc v ICC*, 656 F 2d 1115, 1118-1120 (5th Cir 1981) ("*Am Trucking v ICC*"))

[42] *Am Trucking v ICC*, 656 F 2d at 1123

abusive railroad practices.[43] The Board has approved commodity exemptions upon finding that they will encourage competition, promote energy conservation, and/or further other aspects of the national rail transportation policy by allowing railroads with limited market share to attract traffic from trucks and other modes of transportation.[44] Not only would an exemption for chlorine or any other TIH materials fail to satisfy any of these objectives, it would run counter to them.

IV. Conclusion

UP refused to comply with the law and now seeks the Board's endorsement of its actions. UP is attempting to use this proceeding to exclude a broad, undefined class of commodities from regulation and to thereby circumvent its existing common carrier obligation. The only manner by which the Board may relieve UP or any other common carrier of its obligation to provide rates upon request is through an exemption proceeding UP's Petition is not an application for an exemption By seeking declaratory relief and failing to comply with the ICCTA and the Board's rules regarding exemptions, UP has failed to make the requisite showing to obtain the only form of relief available that would relieve it of its obligation to provide rates upon request As such, the Board has no other alternative but to deny UP's request for declaratory relief.

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[43] *Coal Exp*, 745 F 2d at 81

[44] *See, e g*, *Surface Transp Bd*, *Rail Gen Exemption Auth - Exemption of Rock Salt, Salt*, 10 I.C C 2d 241, 245-246 (1994), *Surface Transp Bd - Liquid Iron Chloride*, 367 I C C 347, 350 (1983), *Surface Transp Bd*, *Rail Gen Exemption Auth - Used Motor Vehicles*, 9 I C C 2d 884, 885-886 (1993)

Respectfully submitted,

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Counsel for ***CF Industries, Inc.***

April 10, 2009

Certification

I hereby certify that I have served all parties of record in this proceeding with this document by United States mail.

Executed on April 10, 2009.

Diane M. Boudalis